

MAY 27 2004

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
) No. 03-44281-elp13 ✓
JAMES IRA NOTEBOOM and)
SHONNA DIANE NOTEBOOM,)
) Debtors.)

In re:) Bankruptcy Case
) No. 04-30384-elp13
ROBERT B. JANES,)
) Debtor.)

In re:) Bankruptcy Case
) No. 04-30407-elp13
RICHARD D. BALCH,)
) Debtor.) MEMORANDUM OPINION

This matter came before the court on creditor Kelly Creek Condominium Association's (the Association) motions for relief from the automatic stay in each of the above-captioned cases. For the reasons outlined below, I will grant the motions.

The Association holds a state court judgment against the debtors in each of these cases for condominium dues and assessments

1 plus an undetermined amount of attorney fees. After the state court
2 had entered judgment in each of these cases, which apparently were
3 tried together along with similar claims against two parties who did
4 not file bankruptcy, the court determined that the Association is
5 entitled to a judgment for attorney fees and directed counsel for
6 the Association to prepare an attorney fee judgment. Before the
7 attorney fee judgment could be entered, each of the debtors filed a
8 petition under chapter 13 of the Bankruptcy Code. The judgments
9 against debtors Noteboom and Janes for dues and assessments are for
10 approximately \$5,700. The judgment against Balch is for
11 approximately \$8,000. According to the Association, the state court
12 has determined that each debtor is jointly and severally liable for
13 approximately \$77,000 in attorney fees.

14 The Association seeks relief from the automatic stay to allow
15 it to obtain entry of the judgment for attorney fees, and to allow
16 the appeal of the state court judgment, which debtors have
17 apparently already filed, to proceed. Each of the debtor's plans
18 discloses the pending appeal and indicates that the amount of the
19 Association's claim cannot be determined until the appeal is
20 completed.

21 The legal issues raised by the debtors' responses to the
22 motions for relief from stay are (1) whether the state court appeal
23 can proceed without relief from stay and (2) whether entry of a
24 judgment for the attorney fees awarded in the condominium lien
25 foreclosure action would change an unsecured claim to a secured
26 claim.

1 Section 362(a) of the Bankruptcy Code provides that the
2 filing of a bankruptcy petition operates as a stay of any
3 enforcement of a prepetition judgment against property of the
4 estate, to create, perfect or enforce any lien against property of
5 the estate, or to create, perfect, or enforce against property of
6 the debtor any lien to the extent the lien secures a claim that
7 arose before bankruptcy. A creditor is entitled to relief from the
8 automatic stay "for cause." 11 U.S.C. § 362(d)(1).

9 1. The automatic stay applies to debtors' state court appeals.

10 Debtors argue that the state court appeal of the dues and
11 assessments judgment is not subject to the automatic stay and so can
12 proceed without relief from stay from this court. That is not
13 correct. The automatic stay applies to all appeals of actions
14 against the debtor, no matter who appeals. Therefore, because the
15 state court actions were against debtors, the automatic stay applies
16 to stay the appeals, even though debtors are the appellants.
17 Ingersoll-Rand Fin. Corp. v. Miller Mining Co., Inc., 817 F.2d 1424,
18 1426 (9th Cir. 1987); In re Rother, 200 B.R. 644 (9th Cir. BAP
19 1996). Therefore, the state court appeals cannot proceed to
20 resolution without an order granting relief from stay.

21 Completion of each of the debtors' chapter 13 plans requires
22 resolution of the state court appeals. Therefore, there is cause
23 for granting relief from stay to allow the state court appeals to
24 proceed.

1 2. Entry of judgment for attorney fees in the state court
2 litigation will not convert an unsecured claim to a secured claim.

3 Debtors argue that the Association's claim for attorney fees
4 connected with the lien foreclosure actions is presently unsecured,
5 and will be converted to a secured judicial lien if the Association
6 is allowed to obtain a judgment for those fees in state court. The
7 Association argues that entry of judgment will not change the status
8 of the claim from unsecured to secured, because the attorney fees
9 are already a statutory lien on debtors' real property. Therefore,
10 the claim is currently secured, and entry of judgment will not
11 change that. For reasons explained below, I agree with the
12 Association's conclusion that it had a prepetition secured claim
13 that included attorney fees.

14 The Association relies on ORS 100.450(2)(b), which provides
15 that, when a claim for an unpaid assessment has been filed and
16 recorded, "such claim shall automatically accumulate the subsequent
17 unpaid assessments and interest thereon without the necessity of
18 further filings under this section." Because the Association had
19 filed and recorded a claim for unpaid assessments, which remain
20 unpaid, it asserts that the lien for those assessments automatically
21 includes the attorney fees incurred in collecting the unpaid
22 assessments.

23 The Oregon condominium statutes provides that, subject to the
24 condominium's declaration and bylaws, a condominium association may
25 "levy and collect assessments for common expenses from unit owners,"
26

1 ORS 100.405(4)(b), and "[i]mpose charges for late payments of
2 assessments, [and] attorney fees for collection of assessments
3" ORS 100.405(4)(k). Unpaid assessments create a lien on the
4 condominium unit: "Whenever an association of unit owners levies any
5 assessment against a unit, the association of unit owners, upon
6 complying with subsection (2) of this section, shall have a lien
7 upon the individual unit . . . for any unpaid assessments and
8 interest as provided in subsection (2)(b) of this section." ORS
9 100.450(1). Subsection (2)(a) requires that the association record
10 its claim for unpaid assessments in the county where the unit is
11 located. Subsection (2)(b) provides for the addition of "subsequent
12 unpaid assessments" to the amount of the claim that has been filed
13 and recorded in accordance with subsection (2)(a).

14 There is no dispute in this case that the Association filed
15 and recorded its claim for the unpaid assessments; the state court
16 foreclosed on the lien created by that claim. Thus, the question is
17 whether the attorney fees incurred in collecting the unpaid
18 assessment automatically become part of the lien.


19 I conclude that they do. "Subsequent unpaid assessments"
20 automatically become part of the claim secured by the lien created
21 by statute. ORS 100.005(1) defines "assessment" to mean "any charge
22 imposed or levied by the association of unit owners on or against a
23 unit owner or unit" Pursuant to ORS 100.405(4)(k), the
24 Association could impose charges for attorney fees for collection of
25
26

1 assessments.¹ Therefore, under the definition set out in ORS
2 100.005(1), the attorney fee charge is an assessment, which under
3 ORS 100.450(2)(b) automatically becomes part of the claim secured by
4 the statutory lien.

5 Because the entry of a judgment for the attorney fees that
6 the state court has determined should be awarded will not affect the
7 status of the claim for fees, which is already a secured claim, and
8 judicial economy will be promoted by allowing issues related to the
9 attorney fees to be decided by the state court and appealed with the
10 assessment issue, there is cause to grant relief from stay.

11 CONCLUSION

12 The Association is entitled to relief from stay to allow the
13 state court appeal to proceed and to allow the state court to enter
14 the judgment for attorney fees. Therefore, I will grant the
15 Association's motions for relief from the automatic stay. Counsel
16 for the Association should prepare the order.

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19 ELIZABETH L. PERRIS
Bankruptcy Judge

20 cc: Matthew A. Levin
21 Richard E. Fowlks
22 Steven E. Benson
23 Brian D. Lynch
24

25 ¹ Debtors do not dispute that Article XIV of the condominium
26 bylaws allows the Association to recover attorney fees incurred in
collecting amounts due under the bylaws.